The Honorable Richard A. Jones

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THE RIVERSIDE PUBLISHING COMPANY, Plaintiff, v. MERCER PUBLISHING LLC, MICHAEL HUBBARD and RACHEL HUBBARD, husband and wife, and the marital community comprised therein, Defendants.	No. 2:11-cv-1249-RAJ **DECLARATION OF BENJAMIN JUSTUS IN SUPPORT OF DEFENDANTS' FED. R. CIV. P. 56(D) MOTION IN RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

I, Benjamin Justus, hereby declare and certify as follows:

1. I am one of the attorneys representing the Defendants in this case. I have personal knowledge of the facts contained herein.

2. As stated in my prior declarations filed in support of Defendants' motion to compel discovery, the documents provided by Plaintiff to date are seriously deficient. Whole categories of relevant information specifically requested in the discovery requests are just plain missing. Oral and written requests to provide complete discovery responses have repeatedly

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been made. As soon as the obvious deficiencies were recognized, Mr. Lybeck e-mailed Plaintiff's counsel on September 10, 2012 and provided a list of categories for which Plaintiff had not provided responsive documents. Attached hereto as Exhibit A is a true and correct copy of the September 10, 2012 e-mail.

8. Four days later, Plaintiff's counsel was requested to confirm that he would not be refusing to produce documents from a list of categories contained in the e-mail. By telephone, Plaintiff's counsel confirmed that Plaintiff was not refusing production of the documents on a categorical basis. Attached hereto as Exhibit B is a true and correct copy of the September 14, 2012 e-mail.

9. Despite numerous discussions and requests, Plaintiff has failed to comply with the discovery requests. Attached hereto as Exhibit C are true and correct copies of additional e-mails from my office to Plaintiff's counsel requesting the production of documents.

10. On October 1, 2012, Mr. Lybeck again e-mailed Plaintiff's counsel with an extensive list of categories of requested communications that Plaintiff had yet to provide. Plaintiff's counsel did not substantively respond to the e-mail. Plaintiff has not produced additional documents responsive to the list contained in the e-mail. Attached hereto as Exhibit D is a true and correct copy of the October 1, 2012, e-mail.

11. Plaintiff also has repeatedly refused to certify that the documents produced to date represent all of the responsive documents in its possession, custody or control. On October 1, 2012, Mr. Lybeck sent an e-mail to Plaintiff's counsel requesting that counsel provide a formal certification that Plaintiff had made full and complete discovery. As noted above, in its narrative responses, Plaintiff's authorized representative had still not signed the verification page. Attached hereto as Exhibit E is a true and correct copy of the October 1st e-mail.

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Plaintiff refuses to provide the formal certification.

12. In September 2012, Defendants subpoenaed records from third parties. The records custodian subpoenas requested documents similar to the documents requested in the requests for production served on Plaintiff. In early October, and just after the discovery cutoff, we received documents from the Fairfax County Public Schools ("Fairfax"). Fairfax is one of Plaintiff's largest customers and is central to the claims, counterclaims and defenses in this case. Documents provided by Fairfax should have been included in Plaintiff's production but were withheld. One specific set of documents sent by Fairfax was an e-mail exchange between Plaintiff and Fairfax through which Plaintiff distributed and also admitted purchasing and copying Defendants' copyrighted test preparation materials. Attached hereto as Exhibit F is a true and correct copy of the April 21, 2008, e-mail and pertinent pages from the attachment to the e-mail.

13. The April 21, 2008, copyright infringement documented in the e-mail is specifically responsive to Defendants' Interrogatory 4 and Requests for Production 2, 18, and 20. Attached hereto as Exhibit G is a true and correct copy of Defendants' First Interrogatories and Requests for Production of Documents and Answers and Responses Thereto.

14. Also included in the documents received from Fairfax County Public Schools was an e-mail dated April 25, 2012, between Fairfax employees discussing the current litigation filed by Plaintiff. Defendants requested that Plaintiff produce documents discussing Defendants' test preparation materials in Requests for Production 2, 17, 18, 19, and 20. *See* Exhibit G, hereto. Out of the thousands of documents produced by Plaintiff, this is one of many categories of requested communications for which Plaintiff has produced little or no documents, despite the fact that Plaintiff has had ongoing communications with third parties

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about Defendants and the litigation. Attached hereto as Exhibit H is a true and correct copy of the April 25, 2012, e-mail.

15. In October 2012, after reviewing documents received through record custodian subpoenas of third parties, we learned that Dr. David Lohman at the University of Iowa requested copies of Mercer Publishing practice materials, and that Riverside and its corporate parent facilitated illicit access. Plaintiff and Dr. Lohman clearly viewed Mercer Publishing materials in their efforts to prepare Plaintiff's practice test materials to compete with Mercer Publishing's practice test materials. Attached hereto as Exhibit I are copies of August and September 2011 emails between Dr. Lohman, his graduate assistant Ryan O'Connor, and Riverside representatives. Again, Defendants had requested that Plaintiff produce documents discussing Defendants' test preparation materials in Requests for Production 2, 17, 18, 19, and 20. *See* Exhibit G, hereto.

16. Beginning in August 2012, Defendants also sought to take the depositions of four key employees of Plaintiff in Chicago. Plaintiff's representatives ultimately refused to appear for the depositions once they were re-noted for the week of October 8, 2012. Attached hereto as Exhibit J are various emails regarding Defendants' request for the depositions of Plaintiff's employees. The most recent notices of depositions served upon Plaintiff's counsel are included with Exhibit J.

17. As is explained in detail in Defendants' Fed.R.Civ.P. 56(d) Motion in Response to Plaintiff's Motion for Partial Summary Judgment (Doc. 75), the information Defendants sought in their discovery requests is directly related to their counterclaims the defenses thereto asserted by Plaintiff. These counterclaims are the subject of Plaintiff's pending motion for partial summary judgment (Doc. 62).

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18. To summarize prior pleadings already in the record, Plaintiff's pending motion argues that Defendants' counterclaims are barred by the *Noerr-Pennington* doctrine. Defendants have argued that the *Noerr-Pennington* doctrine does not protect Plaintiff's current lawsuit and other harmful conduct, in part because the lawsuit and related activities were a sham and not a genuine effort to petition the government for relief. As discussed in detail in Defendants' response to the motion for partial summary judgment (Doc. 83), the limited evidence obtained to date strongly indicates that Plaintiff could not have reasonably believed that its current lawsuit and other threats and actions against Defendants were objectively reasonable, because Plaintiff never had any good faith belief that Defendants had accessed and infringed Plaintiff's copyrighted works.

19. As discussed above and in separate pleadings, the limited materials received from third parties strongly indicate that Riverside did not have a good faith belief of infringement by Defendants. Defendants believe that the outstanding discovery requested from Riverside will necessarily establish and document Riverside's internal consideration and knowledge of this. It is further anticipated that internal documents yet withheld will conclusively establish that Riverside's continuous harassment and interference with Ms. Hubbard were conducted in spite of this knowledge, both currently and historically. This evidence is thus necessary to conclusively rebut Riverside's *Noerr-Pennington* defense and support Defendants' allegation of sham litigation.

20. Also, as discussed in prior pleadings, Plaintiff's pending motion argues that Defendants' counterclaims for tortious interference with their business expectancies fail because Defendants cannot establish that Riverside knew about Defendants' business, or that Riverside interfered with the business for an improper purposes or using improper means. The

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same requested but withheld communications described above would be necessary to conclusively rebut these arguments of Riverside and establish its internal knowledge of Defendants' business and the true intentions and purposes underlying Riverside's acts of interference.

21. Once armed with the requested but withheld internal and external communications of Riverside, Defendants believe that depositions of Riverside's key employees will conclusively establish, by admission from speaking agents, both the rebuttal of Riverside's *Noerr-Pennington* defense and the currently disputed elements of Defendants' counterclaims for tortious interference.

22. As discussed in my prior declaration, I explained to Riverside immediately after service of its narrative responses why the requested but still withheld discovery is necessarily related to the rebuttal of Riverside's *Noerr-Pennington* defense and the currently disputed elements of Defendants' counterclaims for tortious interference. Attached hereto as Exhibit K is a copy of my August 15, 2012 email to counsel for Riverside on these issues.

I declare under penalty of perjury and the laws of the state of Washington the above statements are true and correct to the best of my knowledge.

DATED at Mercer Island, WA, this 16th day of November, 2012.

By: */s/ Benjamin R. Justus*

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